4

No. 2704.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling,

Plaintiffs in Error,

vs.

Elizabeth Knudsen,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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Brief of Defendant in Error Elizabeth Knudsen upon Writ of Error.

First, in response to the first, fifth, ninth and thirteenth assignments of error, they being identical, but set forth separately for different plaintiffs in error, defendant in error contends:

1. That the United States District Court for the Southern District of California, Southern Division, had jurisdiction of the persons of the defendants and of the subject matter of said action.

(a) Because the necessary diversity of citizenship of the adverse parties *actually existed* at the date of the commencement of the action.

See affidavit of Elizabeth Knudsen in support of motion to amend her complaint [p. 135, Tr. of Rec.]; affidavit of Robert L. Hubbard in support of motion for leave to amend complaint [p. 138, Tr. of Rec.], and amendment to complaint [p. 142, Tr. of Rec.]. The *actual existence* of these jurisdictional facts at the time of filing original complaint was sufficient to give the court jurisdiction to make the order, notwithstanding such jurisdictional facts were not pleaded, or were pleaded improperly, and notwithstanding facts were pleaded which affirmatively, but erroneously, showed that the court had not jurisdiction, and the following authorities support that jurisdiction, this faulty allegation of citizenship being discovered by plaintiff and corrected by amendment, upon leave of court, before any of the defendants had filed any plea, demurrer, answer or other response whatever to the complaint, and while the court still had control of the record.

Mexican Central Railway Company v. Duthie, 189 U. S. 76, 47 L. ed. 715, at page 716:

"Duthie brought suit for the recovery of damages for personal injuries in the circuit court of the United States for the western district of Texas against the Mexican Central Railway Company, Limited, and in his original complaint averred that he 'resides in El Paso, in El Paso county, state of Texas, in the western district of said state,' and that defendant was a citizen of the state of Massachusetts. The cause was tried before a jury, and resulted in a verdict and judgment thereon April 10, 1902. The record shows 'that no further proceedings were had in said cause after the entry of said judgment until, to-wit, the 17th day of April, 1902, on which day plaintiff filed his motion ask-

ing leave to amend his petition,' to the effect 'that leave be granted him to now amend his said original and first amended petition by inserting therein the following: 'And is a citizen of said state and of the United States of America,' after the allegation made in said pleading 'that plaintiff resides in El Paso, in El Paso county, state of Texas.' In support of the motion plaintiff stated under oath 'that he is now and was at the date of the filing of his original petition herein, and was on the 22d day of July, 1901, the date of his injuries, a *bona fide* citizen of the United States of America and of the state of Texas.' The court granted leave to so amend, and defendant excepted. Thereupon defendant applied to the court to certify to this court the question of jurisdiction to amend, *and to retain the judgment after such amendment*, and a certificate was accordingly granted.

"If the complaint or petition had remained as it was originally framed, and the case had then been carried to the Circuit Court of Appeals, that court would have been constrained to reverse the judgment and remand the cause for a new trial, *with leave to amend.* Metcalf v. Watertown, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; Horne v. George H. Hammond Co., 155 U. S. 393, 39 L. ed. 197, 15 Sup. Ct. Rep. 167.

"But plaintiff, discovering the defect in the averment before the case had passed from the jurisdiction of the circuit court, applied and obtained leave to amend, and made the amendment. So that the only question is whether the circuit court had power to allow the amendment.

"By paragraph 954 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 697) it was provided that the trial court might 'at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe;' *and since the trial court in the present case*

still had control of the record, it had jurisdiction to act, and we may add that we do not perceive that there was any abuse of discretion in permitting the amendment in the circumstances disclosed. Mexican C. R. Co. v. Pinkney, 149 U. S. 201, 37 L. ed. 702, 13 Sup. Ct. Rep. 859; The Tremolo Patent, 23 Wall. 518, *sub nom.;* Tremaine v. Hitchcock, 23 L. ed. 97.

"If the statutes of Texas forbade such an amendment, the law of the United States must govern. Phelps v. Oaks, 117 U. S. 236, 29 L. ed. 888, 6 Sup. Ct. Rep. 714; Southern P. Co. v. Denton, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44."

Howard v. De Cordova, 177 U. S. 614, 44 L. ed. 910.

Continental Life Insurance Company of Hartford v. Rhoads, 119 U. S. 239, 30 L. ed. 380:

"If the plaintiff was actually a citizen of Pennsylvania when the suit was begun, the record cannot be amended here so as to show that fact, but the court below may, in its discretion, allow it to be done when the case gets back. Morgan's Exr. v. Gay, 19 Wall. 81 (86 U. S. bk. 22, L. ed. 100); Robertson v. Cease, *supra."*

Everhart v. Huntsville Female College *et al.*, 120 U. S. 224, 30 L. ed. 623:

"If on the return of the case to the circuit court it is made to appear that the citizenship necessary for the jurisdiction existed at the time the suit was brought, it will be for that court to determine whether an amendment of the pleadings ought to be allowed, so as to cure the present defects."

Menard v. Goggan, 121 U. S. 253, 30 L. ed. 914:

"If the necessary citizenship actually existed at the time the suit was begun, it will be for the court below

to determine, when the case gets back, whether the record shall be amended so as to show that fact, and thus make out the jurisdiction."

Eberly v. Moore, 65 U. S. 157, 16 L. ed. 612, at page 614:

"The plaintiffs object to the authority of the district court to permit the withdrawal of pleas in bar, for the purpose of pleading to the jurisdiction; that a plea in bar admits the jurisdiction of the court, and the capacity of the plaintiffs to sue, and that they cannot be deprived of the benefit of that admission. *The equitable jurisdiction of the courts of the United States as courts of law is chiefly exercised in the amendment of pleadings and proceedings in the court, and in the supervision of all the various steps in a cause, so that the rules and practice of the court shall be so administered and enforced as to prevent hardship and injustice, and that the merits of the cause may be fairly tried.* Such a jurisdiction is essential to and is inherent in the organization of courts of justice."

Kennedy *et al.* v. Bank of the State of Georgia *et al.*, 49 U. S. 610, 12 L. ed. 1209, at pages 1218 and 1219:

"The *injunction* was issued at the instance of Shultz, and for his benefit, and no question of jurisdiction was raised, *but as there was no allegation in the original bill of citizenship of the stockholders of the Bank of Georgia, it is supposed the proceedings were coram non judice.*

"Over the subject matter of the suit and of the parties, the court had jurisdiction, and the amendment corrected an inadvertence, by *stating the facts of citizenship truly.*

"But if no amendment had been made, would the orders and decrees in the case by the Circuit Court

have been nullities? That they have been erroneous, and liable to be reversed, is admitted. In Skillern's Ex'rs v. May's Ex'rs (6 Cranch. 267) a final decree had been pronounced, and by writ of error removed to the Supreme Court, who reversed the decree, and after the cause was sent back to the Circuit Court, it was *discovered to be a cause not within the jurisdiction of the court;* but a question arose whether in that court it could be dismissed for want of jurisdiction after the Supreme Court had acted thereon. The opinion of the judges being opposed on that question, it was certified to the Supreme Court for their decision. And this court held 'that the Circuit Court was bound to carry the decree into execution, although the jurisdiction of that court be not alleged in the pleadings.'

"*The judgments of inferior courts,* technically so called, are disregarded, unless their jurisdiction is shown. *But this is not the character of the Circuit Courts of the United States.* In Kempe's Lessee v. Kennedy (5 Cranch. 185) this court say: 'The courts of the United States are all of limited jurisdiction, *and their proceedings are erroneous if the jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed, but this court is not prepared to say that they are absolute nullities, which may be totally disregarded.*

"And again in the case of McCormick v. Sullivan (10 Wheat. 199), in answer to the argument that the proceedings *were void, where the jurisdiction* of the court *was not shown,* the court say the argument 'proceeds upon an incorrect view of the character and jurisdiction of the inferior courts of the United States. They are all of limited jurisdiction, but they are not, on that account, inferior courts, in the technical sense of those words, whose judgment, taken alone, are to be disregarded. *If the jurisdiction be not alleged in*

the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error or appeal, be reversed for that cause. *But they are not absolute nullities.'*

"From these authorities, it is clear that the proceedings in the original case *are not void for want of an allegation of citizenship of the stockholders of the bank. They were erroneous, and, had no amendment been made, might have been reversed,* within five years from the final decree, by an appeal or a bill of review. But the mandate of this court which contained the amendment, *as to the citizenship of the stockholders of the bank,* agreed to by the counsel, was filed on the 6th of May, 1830, in the Circuit Court, and it necessarily became a part of the record of that court. *This was before the final decree was entered, and it removed the objection to the jurisdiction of the court. After this, the decree could not have been reversed for want of jurisdiction.* In the case of Bradstreet v. Thomas (12 Peters 64) the court held that an averment of citizenship in a joinder in demurrer, not being objected to at the time, was sufficient to give jurisdiction."

The court will observe that this was a case in which an injunction issued at a time when the jurisdictional fact was entirely wanting, and by a reading of the entire case it will be observed that the lapse of two years intervened during which time judgments, orders and decrees were made and the Supreme Court sustained each and every one of them and carried the jurisdiction back by amendment as to citizenship to support them all.

We take the broad ground that in courts of the United States, no amendment which will result in an examination of the merits of a cause and reach the

ends of justice will be held to violate any existing rule and it is without exception that these amendments have been allowed at every conceivable stage of the litigation by the authority and with the sanction of the Supreme Court of the United States. I have searched diligently and I have not been able to find a case where the allowance of an amendment to these ends has not been sustained by the Supreme Court.

Section 948, U. S. Comp. Stat. 1901, at page 695:

"Any Circuit or District Court may *at any time,* in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure the party against whom such process issues."

Section 954, U. S. Comp. Stat. 1901, at page 696:

"* * * and may at any time permit either of the parties to amend *any defect in the process or pleadings,* upon such conditions as it shall, in its discretion, and by its rules, prescribe."

Hardin v. Boyd, 113 U. S. 760, 28 L. Ed. 1141, at page 1143:

"It may be said, generally, that in passing upon applications to amend, the ends of justice should never be sacrificed to mere form, or by too rigid an adherence to technical rules of practice.

"This record does not show that the Circuit Court had jurisdiction of the suit, which depends alone on the citizenship of the parties.

"If the citizenship of the defendants was, in fact, such at the commencement of the suit as to give the Circuit Court jurisdiction, it will be in the power of

that court, when the case gets back, to allow the necessary amendment to be made *and then proceed to trial.*"

Atchison, T. & S. F. Ry. Co. v. Gilliland, 193 Fed. Rep. 608, at pages 609, 610 and 611:

"The plaintiff in error now asks that the judgment of the court below be reversed and the case remanded, with instructions to dismiss the case for want of jurisdiction. *Counsel for the defendant in error informs the court* that the defendant in error is now, and at the time of the commencement of the action, was a citizen and domiciled in and a resident of the state of New York, and asks that the cause be remanded, with leave to amend the complaint and be permitted to prove that fact. It appears that plaintiff in error is now, and at the time of the commencement of this action was, a corporation duly organized and existing under the laws of the state of Kansas, having its principal office and place of business in that state. *Had the citizenship* of the defendant in error in the state of New York *been alleged* in the complaint and established by proof, *there would have been diversity of citizenship* in the parties plaintiff and defendant, and the Circuit Court *would have had* general jurisdiction over the controversy.

"The objection that diversity of citizenship was not alleged in the complaint *is a defect that may be cured after verdict, by amendment,* under the provisions of section 954 of the Revised Statutes (U. S. Comp. St. 1901, p. 696). That section provides that the trial court 'may at any time permit either of the parties to amend any defect in the process or pleadings upon such conditions as it shall, in its discretion and by its rules, prescribe.'

"The chief justice did not say (in Mexican Cent. Ry. Co. v. Duthie, 189 U. S. 76, 47 L. Ed. 715) that the Circuit Court of Appeals would have been constrained

to set aside the verdict. *The remanding of the cause for a new trial with leave to amend would therefore have been only for the purpose of determining the issue as to the jurisdiction of the court.* We are therefore of the opinion that it is necessary to set aside the verdict in this case.

"If the general jurisdiction of the court did in fact depend upon the diverse citizenship of the parties, and the objections are (1) that it was not so alleged in the complaint and (2) that neither the plaintiff or defendant resided in the district where the action was commenced, the answer with respect to the first objection is that the defect cannot be waived, but may be cured by amendment. Continental Ins. Co. v. Rhoads, 119 U. S. 237, 7 Sup. Ct. 193, 30 L. Ed. 380; Halsted v. Buster, 119 U. S. 341, 11 Sup. Ct. 555, 30 L. Ed. 623; King Bridge Co. v. Otoe County, 120 U. S. 225, 226, 7 Sup. Ct. 552, 30 L. Ed. 623; Menard v. Goggan, 121 U. S. 253, 7 Sup. Ct. 874, 30 L. Ed. 914; Fitchburg R. Co. v. Nichols, 85 Fed. 869, 29 C. C. A. 464; Grand Trunk Ry. Co. v. Reddick, 160 Fed. 898, 88 C. C. A. 80.

"We are therefore of the opinion that the court below should be directed that the plaintiff be allowed to amend her complaint in accordance with the facts, and that the defendant be given an opportunity to meet the new issue thus raised, and have it determined according to law. If upon such determination, it be found that there is diverse citizenship between the parties, a judgment will be re-entered upon the verdict accordingly."

Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 457, 44 L. Ed. 842, at page 845:

"Another question as to jurisdiction arises on the record. The citizenship of the members of the several partnerships that are named as defendants does not

appear from the pleadings or otherwise. An allegation as to the state in which those firms were doing business is not sufficient to show the citizenship of the individual partners. The relief sought is the marshaling of all the lien debts on the hotel and the opera house of the Great Southern Fire Proof Hotel Company, the sale of the property, and the distribution of the proceeds among the parties according to their respective rights. As no allusion was made to this latter at the argument before us, we do not now express any opinion upon the question whether the citizenship of the individuals composing the defendant partnerships doing business in Ohio is material to the jurisdiction of the Circuit Court. We leave that to be determined by the court below, if an application be made to amend the pleadings as to the citizenship of the parties.

"Under the circumstances, the plaintiffs should be allowed, upon application, to amend the bill *upon the subject of the citizenship of the parties. If the amendment shows a case within the jurisdiction of the Circuit Court, the parties should be permitted to proceed to a final hearing.*"

Maddox *et al.* v. Thorn, 60 Fed. Rep. 217, at pages 218, 219 and 220:

"There remains to be considered the first assignment of error, which has been earnestly pressed on our attention in the oral argument, and in the printed brief submitted on behalf of plaintiffs in error. It is that:

" 'The trial court erred in allowing the plaintiff to amend his petition in this cause so as to show *diverse citizenship* of the parties, plaintiff and defendants, after the court, had, from the bench, rendered his judgment herein, and after defendants had moved to arrest said judgment, because there was no allegation and no proof of *diverse citizenship* of the parties, and the court had

no jurisdiction over the case, and because to allow an amendment at that time, and hear testimony upon a new issue, was, in effect, to compel defendants to defend a new suit, without notice or time for preparation, as appears from defendants' bill of exception No. 1.'

"Appellants stand on the proposition that after the judge had announced what his decision was, and what the judgment of the court would be (for it was not yet entered), the court could not, under any circumstances, permit the defect in the record to be cured without awarding a new trial. Without reviewing the authorities (which are very numerous) on the subject of the trial judge's discretion to allow amendments *of substance,* pending a trial, without vacating the submission, we are of opinion that the provision of the statute which say any court of the United States *'may at any time permit either of the parties to amend any defect in the process or pleadings upon such conditions as it shall in its discretion, or by its rules, prescribe,'* is broad enough to warrant the action of the trial judge in allowing the amendment on terms, and subject to review. The amendment offered was one of *vital substance.* The matter of it is generally susceptible of ready and abundant proof, and hence, in practice, it is most generally not contested,—is virtually admitted when properly pleaded. It is, however, necessary to be proved, unless so virtually admitted, when it is put in issue by proper pleading. It is not now material to inquire what character or amount of proof on that subject is *prima facie* sufficient. The pleading having been sworn to by the plaintiff's counsel, who was still present in court, to be cross-examined if the defendants so desired, and nothing then shown by the defendants, or yet shown by them, to indicate that the discretion was improvidently exercised, we are of opinion that this assignment of error is not well taken."

Bradstreet v. Thomas, 37 U. S. 62, 9 L. Ed. 999, at pages 1001 and 1002:

"A motion has been made by the defendant in error to dismiss this case upon the ground that the averment necessary to give jurisdiction to the courts of the United States do not appear in the record. The decisions which have heretofore been made on this subject render it proper that the circumstances under which this motion comes before the court should be stated.

"A writ of right was brought in the District Court for the Northern District of New York, to recover certain lands situated in the state of New York. The demandant, in her declaration, avers that she is an alien, and a subject of the king of the United Kingdom of Great Britain and Ireland; *but does not aver that the tenant is a citizen of the state of New York, or of any other state of the United States.* The suit was brought to January term, 1825, at which term the tenant appeared, and prayed leave to imparle until the next term; 'saving all objections as well to the jurisdiction of the court as to the writ and count.'

"The case was continued from term to term, until August term, 1826, when the tenant put in the usual plea to the first count, and demurred to the second and third, setting down special causes of demurrer. The demandant joined in the mise on the plea, and joined in the demurrer; and, in her joinder in demurrer, she averred that the citizenship in the counts was not one of the causes of demurrer assigned by the tenant. The demurrers were decided against the demandant at August term, 1827, and further proceedings were had which it is unnecessary to state here, and the case continued until August term, 1831, when the defendant moved the court to dismiss the suit for want of jurisdiction, assigning as the foundation of this motion the

want of an averment of the pecuniary value of the lands demanded in the counts filed by the demandant.

"The court sustained the motion and dismissed the suit. But at that time no objection to the jurisdiction was made on account of the omission to aver the citizenship of the tenant.

"In 1832 this *dismissal* of the suit was brought before the Supreme Court, and a rule laid on the District Court to show cause why the case should not be *reinstated* in that court; and at January term, 1833, a pre-emptory mandamus was issued by this court, commanding the District Court to *reinstate* the suit, and *'to proceed to try and adjudge according to the law and right of the case,* the said writ of right and the mise therein joined.' *The mandamus was obeyed and the cause reinstated,* and the mise tried and found against the demandant, and judgment entered against her at November term, 1837. The case is now before us upon a writ of error on this judgment; *and a motion is made to dismiss the case, upon the ground that neither the District Court nor this court could have jurisdiction of the suit, because the demandant is an alien, and there is no averment that the tenant was a citizen of New York.*

"The above statement of the proceedings makes it evident that the dismissal of the suit upon this ground at this time would be a surprise upon the demandant, who has been prosecuting the suit for many years; *most probably under the impression that the averment of citizenship contained in her joinder in demurrer was considered by this court and by the District Court to be a sufficient compliance with the rules of pleading established by the decisions of this court,* for the averment in question was received in the District Court without objection; and, indeed, would seem to have been regarded as sufficient by that court; because when the suit was dismissed there, upon the ground that the

counts did not contain proper averments to give jurisdiction, no notice was taken of the want of this averment in the counts, nor any objection to the place where it had been inserted in the pleadings, and when the case was brought before this court, on the application for the mandamus, the fault in the pleadings now charged was not noticed by the court in the opinion delivered, and does not appear to have been brought to their attention by the counsel for the tenant. (7 Peters 634.) The demandant might, therefore, reasonably have supposed that the court deemed the averment sufficient, because certainly the mandamus would not have been issued, commanding the District Court to reinstate the case, and proceed to try it, unless this court had been of the opinion that a sufficient cause was presented by the pleadings to give jurisdiction to the District Court.

"The motion is therefore overruled."

We add the deduction of the principle by text writers as follows:

1 Enc. Pl. & Pr. on pages 510, 511 and 512:

"A federal statute provides for the amendment of defects in pleadings and proceedings in civil actions. And another provision declares in substance that the practice at law in the federal courts shall conform to the practice of the state in which the court is held. Where the state statute allows amendments at any state of the case as a matter of right, the federal court will not exercise a discretion to deny the amendment.

"Defective averments as to the residence of the parties are amendable; and under the authority to amend 'by inserting other allegations material to the case,' it has been held that a plaintiff may be allowed to amend his complaint by inserting allegations proper to obviate an objection that the court has no jurisdiction of the cause of action.

"In the federal courts, the want of an averment of diverse citizenship of the parties may be supplied by amendment, and the plaintiff may amend his declaration to show that he was an alien when the action was brought *instead of a citizen as alleged.* Such amendments have been allowed after a demurrer sustained, pending a motion in arrest of judgment on account of the defect, and have been sanctioned by the Supreme Court even where the judgment below has been reversed because the record lacked the proper jurisdictional averments."

1 Enc. Pl. & Pr. on page 599:

"In some jurisdictions it is the declared policy of the court always to allow amendments of the pleadings on the trial upon just terms when they are found to be so defective that the real subject of dispute cannot otherwise be determined. And the exercise of discretion by the trial court is rarely disturbed where the application to amend is granted."

Lee v. Murphy, 119 Cal. 364, 51 Pac. 550:

"Considerable space is given in the record and in briefs of counsel as to the alleged error of the court in allowing plaintiff to amend her complaint after having gone to trial and submitted the case for decision. One of the amendments allowed was to the effect that the money loaned to Murphy was the purchase money paid for the land mortgaged. Defendant moved to strike this amended complaint from the files, and to vacate and set aside the order granting plaintiff leave to amend, which motion was denied, and defendant excepted. The power given under section 473, Code Civ. Proc., to allow amendments in the interest of justice, *is uniformly held to be within the discretion of the trial court; and it has been frequently held that this court will not*

disturb the action of the trial court except where an abuse of that discretion is shown. It is unusual to find it necessary to amend the complaint after a case has been submitted; but I find no limitation as to the time before judgment entered when the power of the court ceases, and even after judgment *it may be exercised for the relief of a party where the judgment results from mistake, inadvertence, surprise or excusable neglect."*

Southworth v. Resing, 3 Cal. 377, at page 378:

"And as a matter of practice, it is safest to award an arrest, even in cases of doubt, because the defendant is protected by the undertaking of the plaintiff, which the law requires to that effect, while on the other hand, *frauds are proverbially concocted with so much artfulness and ingenuity as render them at all times difficult to be exposed;* and when such a case actually exists, *the plaintiff is remediless, without the process of arrest. A different rule would almost, if not certainly, destroy its efficiency as a legal remedy."*

Counsel for defendants have overlooked the fact that the United States Supreme Court has drawn a clear and substantial distinction between decisions where the District Court is without jurisdiction for an entire want of facts to constitute a cause of action which would deprice it of jurisdiction and decisions where for the want of an allegation of citizenship it is without jurisdiction. In the former case, it is of far greater importance and the question of relation to the commencement of the action is not at all as clear as is the case when, as the cases repeatedly reiterate: *"The jurisdiction depends alone upon diversity of citizenship."* The court will observe that this distinction is constantly held before the mind and that the omission to allege

proper citizenship is such an omission of jurisdictional fact as calls for the liberal allowance of amendments.

Maddox *et al.* v. Thorn, 60 Cal. App. 217, 218 and 219:

"Where the trial court allowed plaintiff to amend his petition so as to show *diverse citizenship.*"

And the court say:

"The matter of it is generally susceptible of ready and abundant proof, and hence, in practice, it most generally is not contested,—is virtually admitted when properly pleaded."

(b) Said amendment related back to the filing of the original complaint, being an amendment to the original complaint.

Birdsall v. Perego, 5 Blatchf. (U. S.) 251:

"In the federal courts it is proper in an amended declaration to state the citizenship of the parties in the *present tense,* without stating such citizenship as existing at the time of the commencement of the suit, because *the amendment relates back.*"

1 Inc. Pl. & Pr. at page 621:

"When an amendment has been properly made and is for the same cause of action, the amended pleading is regarded as a continuation of the original pleading and *takes effect* as of the date when the latter (the original pleading) was filed."

Fleenor v. Taggart, 116 Ind. 189:

"Where a judgment is reversed on appeal, a proper amendment filed after remand to the trial court *relates to the commencement of the suit.*"

Fling v. Trafton, 13 Me. 295:

"Where the name of one of two defendants was stricken out by permission of the court on motion of the plaintiff and with the assent of the only defendant appearing in defense, the action stood as if it had been originally brought against the only remaining defendant, and a writ of review was properly brought in the name of the latter alone."

Cooke v. Cooke, 43 Md. 522:

"A suit upon the causes of action set forth in the amendment, provided it be not entirely new, will be considered as pending from the beginning as regards an intervening fraudulent conveyance made by the defendant."

Link v. Jarvis, 33 Pac. at 207:

"Besides, an amended complaint relates back to the commencement of the action, if a new cause of action is not pleaded, and new parties are not brought in."

Barber v. Reynolds, 33 Cal. 497, at page 500.

White v. Soto *et al.*, 82 Cal. 654, 23 Pac. 211:

"The amended complaint was filed on July 22, 1885, but, as it was based upon the same cause of action, *it related back to the date upon which the original complaint was filed."*

Preston v. Culbertson, 58 Cal. 198, at page 208:

"The amended complaint does not allege a cause of action against any new party; *it relates to the commencement of the contest."*

Easton v. O'Reilly, 63 Cal. 305, at page 308:

" 'The amended complaint supersedes the original, but there is no dismissal of the action. It simply takes the place of the other. No new or different action is

commenced, and no new cause of action is introduced. There is no change in the identity of the cause of action. That is the same as before, and the commencement of the action *dates from the filing of the original complaint* and the issuing of summons thereon.' "

Lorenzana v. Camarillo, 45 Cal. 125, at page 128:

"The defense of the Statute of Limitations must fail, inasmuch as it points to the time of filing the amended and not *the original complaint as the period of time at which the statute is claimed to have barred the plaintiff.*"

Marshalltown Stone Co. v. Louis Brach Const. Co., 125 Fed. Rep. at page 748:

"Defendants demur to this count of the petition for the same reason as they demurred to the first count; and they seek to make the point that the action was not brought within six months from the 15th of April, 1902, because on December 5, 1902, the plaintiff filed an amended and substituted petition. The defendants insist that this amended and substituted petition was the bringing of a new action. But from the original petition it will be seen that plaintiff makes complaint of the grievances as in its amended and substituted petition. The occasion for filing the amended and substituted petition was to correct some omissions in the exhibits, and with more certainty state the cause of action. This being so, *the action should be regarded as commenced when the original notice therefor was given to the sheriff for service.* The demurrer of both defendants will be overruled."

Middlesex Bk. Co. v. Smith, 83 Fed. Rep. 133;
Southern Pacific M. Co. v. Superior Court, 14 Cal. App. 240, at page 241.

To the strength of the foregoing cases, we beg to reiterate that all the cases cited under the first proposition should be added hereto for the plain reason that they and all of them carried the effect of the amendment back to the commencement and to the filing of the original complaint.

(c) The allegation of citizenship in the amendment in the present tense was sufficient and proper, and, coupled with the affidavits and motion for leave to amend, all of which are a part of the record, show the necessary diverse citizenship to have existed at the time of the filing of the original complaint.

Birdsall v. Perego, 5 Blatchf. 251:

"In the federal courts it is proper in an amended declaration to state the citizenship of the parties in the *present tense*, without stating such citizenship as existing at the time of the commencement of the suit, because *the amendment relates back*.

"The declaration, which was an amended one, set out that the plaintiff 'is a citizen of the state of Indiana' and that the defendant 'is a citizen of the state of New York.'

"But, it is insisted on the part of the defendant, that the declaration is bad in substance, because it states the citizenship of the parties in the present tense, instead of stating said citizenship as existing at the time of the commencement of the suit, it being insisted that this allegation of the amended declaration related to the date of the filing of that declaration, and not to the time of the commencement of the suit. The objection must be overruled."

Mexican Central Railway Company v. Duthie, 189 U. S. 74, 47 L. Ed. 715, at page 716:

"The record shows 'that no further proceedings were had in said cause after entry of said judgment until, to-wit, the 17th day of April, 1902, on which day plaintiff filed his motion asking leave to amend his petition,' to the effect 'that leave be granted him to now amend his said original and first amended petition by inserting therein the following: 'And *is* a citizen of said state and of the United States of America,' after the allegation made in said pleading 'that plaintiff resides in El Paso, in El Paso county, state of Texas.' "

(d) The court had the right to look at the whole record, the complaint as well as the affidavits, in passing upon the application for the order of arrest, or on a motion to vacate the same, and this, too, at the time of hearing the motion.

McBride v. Langan, 10 N. Y. Supp., 18 Civ. Proc. R. 201:

"Where the complaint in an action for goods sold alleges, in the language of Code Civ. Proc. 549, Sub. 4, providing for arrest in civil cases, that the defendants were 'guilty of a fraud in contracting or incurring the liability,' it may be amended so as to state the facts constituting the fraud."

Blakelee v. Buchanan, 44 How. Prac. 97:

"When the judge who grants an order of arrest becomes judicially satisfied, from the allegations contained in the *complaint and affidavit,* that a cause of action exists, and that it is not one of a trivial character, and it cannot be said from the proof presented upon the notice to vacate the order of arrest that the

discretion of the judge was erroneously exercised, the motion to vacate will be denied."

Chapman v. H. D. Mercantile Co., 53 Pac. 778:

"The defendant stated in his motion to vacate the order of arrest that the papers in this cause will be used in evidence on the hearing of this motion. Upon the hearing of the motion all the papers and files of the case, if competent, were proper for the consideration of the court. The amended affidavit became one of the papers in the case when filed, and was proper evidence for consideration, on the hearing of the motion, as one of the papers in the case."

In Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, and cases therein embraced and cited, the court will observe that the United States Supreme Court, in harmony with the cases cited in this brief, uses this language, "the difference of citizenship on which the right of removal depends *must have existed at the time when the suit was begun,*" and that the necessary citizenship must affirmatively appear from the pleadings or *elsewhere in the record.*

The same is true of King Iron Bridge and Mfg. Co. v. County of Otoe, 120 U. S. 225: *"From the record."*

And in Parker v. Ormsby, 141 U. S. at page 83: *"Upon the record."*

And it is a rule without exception that if the jurisdictional fact of citizenship appears *in any part of the record* while the District Court has control of that record, it is sufficient.

Denny v. Pironi & Slatri, 141 U. S. 121, 35 L. Ed. 657, at page 658:

"It has been repeatedly held that it was not necessary for the averment to appear in the pleadings, but that the statute was complied with *if it appeared in any part of the record.*"

Mexican Central Railway Co. v. Duthie, 189 U. S. 76, 47 L. Ed. 715, at page 717:

"And since the trial court in the present case *still had control of the record it had jurisdiction to act,* etc."

Kennedy *et al.* v. The Bank of the State of Georgia, 49 U. S. 586, 12 L. Ed. 1209, at page 1219:

"But the mandate of this court which contained the amendment as to the citizenship of the stockholders of the bank, * * * was filed on the 6th day of May, 1830, in the Circuit Court, and it necessarily became a part of the record of that court. This was before the final decree was entered and it removed the objection to the jurisdiction of the court. *After this, the decree could not have been reversed for want of jurisdiction.*"

Hanson v. Langan, 16 N. Y. Supp. 383:

"Where the complaint states a sufficient cause of action on contract, and the affidavit filed with it states in detail the facts constituting the fraud, the order of arrest should not be vacated without first giving plaintiff an opportunity to amend his complaint."

It is pertinent in this connection to call the court's attention to the amended notices of motions to vacate the order of arrest made by plaintiffs in error in the District Court, and to the language there used: "Said motion will be based upon this notice of motion, and upon the *records, files and pleadings in said action.*"

See paragraph IV of each of the amended notices of motions for an order vacating order of arrest [pp. 153, 155, 158 and 160, Tr. of Rec.]; also see paragraph III of notices of motion to vacate order of arrest [pp. 143, 147, 149 and 151, Tr. of Rec.] where same language is used.

It will be noted that the statement of plaintiffs in error that "we are making this motion under section 503, *upon the papers on which the order of arrest was made*" (first three lines of paragraph two, page 36, brief of plaintiffs in error), is incorrect.

We cite the following additional cases:

Pitts., Cinn. and St. Louis Ry. Co. v. Ramsey, 22 Wall. 322, 22 L. Ed. 823, at page 824 (second paragraph);

Ex parte Smith, 4 Otto 455, 24 L. Ed. 165, at page 166 (third paragraph);

Bridges v. Sperry, 5 Otto 401, 24 L. Ed. 390 (Second paragraph).

Robertson v. Cease, 7 Otto 646, 24 L. Ed. 1057, at page 1058:

"It is the settled doctrine of this court that, in cases where the jurisdiction of the federal courts depends upon the citizenship of the parties, the facts, essential to support that jurisdiction, must appear *somewhere in the record*. Said the present chief justice, in R. Co. v. Ramsey, 22 Wall. 322, 22 L. Ed. 823: 'They need not necessarily, however, be averred in the pleadings. It is sufficient if they are, *in some form, affirmatively shown by the record.*"

Gordon v. Third National Bank, 144 U. S. 97, 36 L. Ed. 360, at page 362:

"The question of jurisdiction is raised for the first time in this court, and as we are of opinion that the diverse citizenship of the parties appears affirmatively and with sufficient distinctness from the record, *of which the summons forms a part,* we must decline to reverse the judgment on this ground, although greater care should have been exercised by the plaintiff in the averments upon that subject."

Ex parte Cohen, 6 Cal. 320 (last paragraph on page).

Second. In response to the second, sixth, tenth and fourteenth assignments of error, they being identical, but set forth separately for different plaintiffs in error, defendant in error contends:

1. The diversity of citizenship necessary to give the court jurisdiction of the parties need not *be made to appear in or by the affidavits upon which the order of arrest is based.*

Cooper v. Dungler, Fed. Cas. No. 3,192, 4 McLean (U. S. 1847) 257:

"An affidavit to hold to bail in a suit in the Circuit Court of the United States *need not state that the plaintiff is a citizen of a state other than that in which the suit is brought or an alien.*"

United States v. Walsh, Fed. Cas. No. 16,635, 1 Abb. (U. S.) 66, Deady 281:

"Where the cause of action and arrest are identical, a verified complaint is a sufficient affidavit upon which to allow an order of arrest."

Crandall v. Bryan, 15 How. Prac. 48:

"There is no necessity that the papers presented as the basis of an application for an order of arrest on the ground of fraud should make out every fact entering into the fraud by evidence which would be competent to establish it on affirmative recovery."

Hanson v. Langan, 9 N. Y. Supp. 625.

Hanson v. Langan, 16 N. Y. Supp. 383:

"Where the complaint states a sufficient cause of action on contract, and the affidavit filed with it states in detail the facts constituting the fraud, the order of arrest should not be vacated without first giving plaintiff an opportunity to amend his complaint."

McBride v. Langan, 10 N. Y. Supp. 554, 18 Civ. Proc. R. 201:

"Where the complaint in an action for goods sold alleges, in the language of Code Civ. Proc. 549, Sub. 4, providing for arrest in civil cases, that the defendants were 'guilty of a fraud in contracting or incurring the liability,' it may be amended so as to state the facts constituting the fraud."

Blakelee v. Buchanan, 44 How. Prac. 97:

"When the judge who grants an order of arrest becomes judicially satisfied, from the allegations contained in the complaint and affidavit, that a cause of action exists, and that it is not one of a trivial character, and it cannot be said from the proof presented upon the notice to vacate the order of arrest that the discretion of the judge was erroneously exercised, the motion to vacate will be denied."

Knox v. Greenleaf, Fed. Case No. 7, 909:

"If the question before the court be doubtful as to

law or fact, the court will not discharge on common bail, but will put the defendant to his plea."

Southworth v. Resing, 3 Cal. 377, at page 378, *supra;*

Mansfield C. & L. M. R. Co. v. Swan, 111 U. S. 379, 28 L. Ed. 462, *supra;*

King Iron Bridge & Mfg. Co. v. Co. of Otoe, 120 U. S. 225, 30 L. Ed. 623, *supra;*

Parker v. Ormsby, 141 U. S. 81, 35 L. Ed. 654, *supra;*

Denny v. Pironi & Slatri, 141 U. S. 121, 35 L. Ed. 657, at page 658, *supra;*

Mexican Central Railway Co. v. Duthie, 189 U. S. 76, 47 L. Ed. 715, at page 717, *supra;*

Kennedy *et al.* v. The Bank of the State of Georgia *et al.,* 49 U. S. 586, 12 L. Ed. 1209, at page 1219, *supra;*

Pitts., Cinn. and St. Louis Ry. Co. v. Ramsey, 22 Wall. 322, 22 L. Ed. 823, at page 824 (second paragraph);

Ex parte Smith, 4 Otto 455, 24 L. Ed. 165, at page 166 (third paragraph);

Bridges v. Sperry, 5 Otto 401, 24 L. Ed. 390 (second paragraph);

Robertson v. Cease, 7 Otto 646, 24 L. Ed. 1057, at page 1058 (fifth paragraph);

Gordon v. Third National Bank, 144 U. S. 97, 36 L. Ed. 360, at page 362, *supra;*

Ex parte Cohen, 6 Cal. 320 (last paragraph on page).

2. The affidavits are sufficient as to allegations of fact, and meet every requirement of the laws of the state of California.

See section 479, California Code of Civil Procedure, which reads:

"The defendant may be arrested, as hereinafter prescribed, in the following cases:

"1. In an action for the recovery of money or damages on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the state with intent to defraud his creditors.

"4. When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought; or in concealing or disposing of the property for the taking, detention, or conversion of which the action is brought.

"5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors."

(a) In compliance with this requirement of the statute and under subdivision one of section 479, it is set forth, in the affidavit of Elizabeth Knudsen [p. 93, Tr. of Rec.]:

"Affiant further says, that the defendant Edwin R. Crooker has repeatedly stated within the past sixty days, to persons in the city of Los Angeles, that he intended to go to England to remain indefinitely."

And on the same page:

"That the defendants Edwin R. Crooker, Harry L. Crooker, Louise E. Crooker and W. P. Ellis are at this time preparing for immediate departure from the United States by steamer for Australia with the inten-

tion of remaining permanently out of the United States."

And at page 95, transcript of record:

"Affiant further says that during the past twelve months she has repeatedly endeavored to locate the said Edwin R. Crooker and Harry L. Crooker and has repeatedly failed, but that within the last thirty days she had a conversation with a business man of the city of Los Angeles and that the person was reluctant to give affiant any information concerning the said company or the said Crookers and would not do so until affiant promised him that she would not in any way use his name in connection with this litigation; that she did promise not to use his name; that thereupon the person referred to told affiant that he had seen and talked with Edwin R. Crooker in the city of Los Angeles on or about the 20th of December, 1914; that the said Crooker had told him that he was preparing to leave the United States and to go to England where he expected to carry on business."

And again at page 96:

"Affiant further says that the person above referred to at the said time and place told affiant that the said Edwin R. Crooker had told said person that he, said Crooker, had just returned to America from England and that in England he was doing an excellent business, and was anxious to return to England because on the day that the war broke out, he, the said Crooker, was about to close a $100,000 deal; that said Crooker told him that in England the old business was very good, but that they were going to use the same old plan and contract that they used here in connection with the sale of clothes-washers, ovens and flues, and in the United States were going to operate with a new and different scheme in connection with other articles."

And while this affidavit is based, as of necessity it must be, largely upon information and belief, the affidavit complies strictly with the statute, California Code of Civil Procedure, section 481:

"The affidavit must be either positive or upon information and belief; and when upon information and belief, it must state the facts upon which the information and belief are founded."

In compliance with this statute, the affidavit contains [p. 94, Tr. of Rec.] "the facts upon which the information and belief are founded." [Pp. 94, 95 and 96, Tr. of Rec.] And in addition thereto it will be observed that the affidavit sets forth [p. 95, Tr. of Rec.]:

"Affiant further says that during the past twelve months she has repeatedly endeavored to locate the said Edwin R. Crooker and Harry L. Crooker and has repeatedly failed."

And again [p. 96, Tr. of Rec.]:

"Affiant further says that at various times during the past sixteen months she has tried to get service upon Edwin R. Crooker and Harry L. Crooker in an effort to get redress for the wrongs done her through the courts, but that in each instance the said Crookers have eluded service and have departed from the places where she sought to prosecute actions against them before service could be had upon them."

And immediately following this language she sets forth and recites incidents, times and conditions when the said Crookers suddenly absconded, which recital please see pages 97, 98 and 99, transcript of record.

Again at page 88, transcript of record, the affidavit sets forth:

"That the defendants and each of them will, immediately upon learning of the filing of this action, absent themselves from the jurisdiction of this court, and will leave the state of California, and the United States, and avoid the service of writs and processes issued out of this court, upon them."

And again [beginning in the sixth line from the bottom of p. 92, Tr. of Rec.]:

"And that said Edwin R. Crooker and Harry L. Crooker do not abide or remain in any one place for any considerable length of time but are for the most part and for the greater part of time traveling from one state to another within the United States, and from the United States to foreign countries."

We feel that the foregoing quotations, while they do not constitute all of the matter in the affidavit of the character, sufficiently show compliance with the statute, and, when an affidavit is made upon information and belief, the facts upon which the information and belief are founded may also be stated upon information and belief.

Matoon v. Eder *et al.,* 6 Cal. 57:

"The affidavit on which the writ issued made the statutory averments of fraud on information and belief, and also set forth *on information and belief* the facts on which the belief of fraud was founded.

"An examination satisfies my mind that the affidavit, on which the order of arrest was issued, is sufficient, and this would dispose of the point, were it not desirable that some rule should be established to govern future cases."

8 Encyc. Pl. & Pr. 601:

"If, however, the facts are stated on information and belief, the sources of the information should be shown, and the methods by which it was communicated, in order to enable the court to see that the party's belief is well founded. And it should be shown why the affidavit of the party from whom the information was received is not produced.

"If the affidavit is not based on the personal knowledge of the party, the facts should not be so stated. An affidavit stating facts as within the personal knowledge of affiant, when clearly they are not, is insufficient to sustain an order of arrest."

8 Encyc. Pl. & Pr. 604:

"Or, if the statement is on information and belief, the informant's name should be given, or the reason stated why it is not given, or why his affidavit has not been obtained and presented."

Tallman v. Whitney, 5 Daly (N. Y.) 505:

"In an action for deceit, where an order of arrest has been obtained on proof of the same facts as those alleged in the complaint, the order will not be vacated unless it is clear that on the trial the plaintiff must fail in his proof of the facts charged in his complaint."

3 Cyc. 972:

"(II) *Prima facie* force of affidavit to hold to bail. When defendant moves on the merits to vacate the order of arrest, or to be discharged from arrest, the affidavit to hold to bail, or other evidence upon which the order was granted, is *prima facie* sufficient to sustain the order. Hence, the defendant's evidence should squarely and unequivocally meet that upon which the order was granted.

"(III) Burden of Proof. The burden of proof is on plaintiff when the order was granted on a *ground extrinsic to the cause of action,* and is on defendant when the order was granted on a *ground identical with or dependent upon the cause of action.*"

(b) In compliance with the statute and under subdivision four of said section 479, California Code of Civil Procedure, the affidavit shows "the fraud in contracting the debt or incurring the obligation for which the action is brought."

At page 91, Tr. of Rec.: "Affiant further says that the defendants, and each of them, have been guilty of a fraud in contracting the debt and in incurring the obligation for which the above-entitled action is brought."

Again [p. 74, Tr. of Rec.], beginning in line 4 and all matter thereafter following to and including the words, "penury and want," in the third line from the bottom of page 87, Tr. of Rec., will be found a continuous statement of the acts of fraud.

And, again [beginning at the bottom of page 89, all of page 90, and ending on page 91, Tr. of Rec.], will be found additional acts of fraud enumerated.

And, again [beginning with the last paragraph on p. 100, Tr. of Rec., and all matter thereafter following to and including the words, "have the money," at the end of the affidavit on p. 104, Tr. of Rec.], will be found further acts of fraud.

For additional and more convincing and conclusive acts of fraud upon the part of the plaintiffs in error, as alleged in said affidavit, see the contract, it being

Exhibit "A," and a part of said affidavit [pp. 105 to 121, inclusive, Tr. of Rec.].

(c) The affidavit is sufficient upon the fact of disposal, removal and secretion of property by the plaintiffs in error under subdivision five of section 479, California Code of Civil Procedure, as shown by the affidavit [beginning in the third line from the bottom of page 87, Tr. of Rec., and continuing to the middle of page 88, Tr. of Rec.].

Again [beginning in the nineteenth line of p. 90, Tr. of Rec.], this language will be found:

"That the said defendants, and each of them have, almost from the commencement of business by the defendant corporation, kept the property and assets of said corporation hidden, secluded and so far as possible out of the reach of process of courts, and have kept the money of said corporation and their own money in private vaults and other secret places where the same could not be reached by the process of law, and that Edwin R. Crooker, one of said defendants, has even threatened this affiant with violence and bodily harm, if she made further attempt to recover the monies due her."

And, again [p. 91, Tr. of Rec.]:

"Affiant further says that the defendants, and each of them, have removed, have disposed of, and have hidden, secreted and kept in secret places, the property of the defendant corporation, Domestic Utilities Manufacturing Company, and the property of each of the said several defendants for a long time prior to this date with the intent to defraud the creditors of the defendant, Domestic Utilities Manufacturing Company, and of

them, the said several individual defendants, and particularly to defraud this affiant."

And, again [p. 103, Tr. of Rec.]: "Affiant further says that each and all of said defendants have been personally and equally active in hiding and secluding the property of said corporation to prevent recovery by persons who were wronged by said defendants," and the paragraph immediately thereafter following and ending on page 104, Tr. of Rec.

Third, in response to the third, seventh, eleventh and fifteenth assignments of error, they being identical, but set forth separately for different plaintiffs in error, defendant in error contends:

1. That the first ground or reason given, to-wit, that the complaint in said action, at the time of the issuance of said order of arrest, showed affirmatively upon its face that the diversity of citizenship necessary to confer jurisdiction upon said court did not exist, is fully met and answered by the authorities herein above cited in response to assignments of error first, fifth, ninth and thirteenth.

2. It does appear from said complaint that a cause of action existed against said plaintiffs in error as appears from said complaint and parts thereof to which reference is made as follows:

(a) As to the corporate existence of said corporation and the relation of the individual defendants thereto, see paragraphs second, third and fifth of complaint [pp. 7, 8 and 9, Tr. of Rec.].

(b) As to the execution of the contract involved,

see paragraphs fourth and fifth of complaint [pp. 8 and 9, Tr. of Rec.].

(c) As to plaintiff's reliance upon the promises and agreements in the contract and the entry upon the performance of the contract by plaintiff, see paragraphs seventh and ninth of complaint [pp. 10 and 11, Tr. of Rec.].

(d) Defendants failed to carry out the contract; paragraph ninth of complaint [pp. 11 and 12, Tr. of Rec.].

(e) As to fraud, see last three lines page 12 to the end of first paragraph on page 24, Tr. of Rec., inclusive; paragraphs eleventh, twelfth, thirteenth and fourteenth of complaint [pp. 25 to 35, Tr. of Rec.].

(f) As to sums paid for the purchase of goods which were never delivered by defendants, see subdivision (b) of paragraph ninth of complaint [pp. 16, 17 and 18, Tr. of Rec.].

(g) As to outlays of money in establishing factories and salesrooms with the consent and authority of defendant corporation and the hindrance and ruination thereof by the defendants, see subdivisions (c), (d) and (e) of paragraph ninth of complaint [pp. 17 to 21, inclusive], and paragraph twelfth of complaint [pp. 26 to 32, inclusive, Tr. of Rec.].

(h) As to failure of defendants to repay any moneys by plaintiff paid to defendants for goods which were never delivered and their failure to repay to plaintiff sums by her paid out, and the failure of defendants to reimburse plaintiff for losses by them occasioned, see paragraph eleventh of complaint [pp. 35 and 36, Tr. of Rec.].

(i) As to demands for repayment of said sums, see first lines of paragraph eleventh of complaint [p. 25, Tr. of Rec.].

(j) As to *bona fides* of defendant in error, see paragraph seventh of complaint [p. 10]; also, paragraph ninth of complaint [p. 11]; also, paragraph tenth of complaint [p. 24, Tr. of Rec.]; also, agreement, "Exhibit A" to complaint, beginning on page 37, Tr. of Rec., and also retail contract, beginning at page 51, Tr. of Rec.

(k) As to hindrance, damage and destruction of business of defendant in error by plaintiffs in error, see paragraph ninth of complaint [pp. 11, 12 and 13, Tr. of Rec.]; also first paragraph on page 15, Tr. of Rec.; also subdivisions (a), (c), (d) and (e) of paragraph ninth of complaint [pp. 15, 17, 18 and 20, respectively]; also last paragraph [p. 23], and first paragraph [p. 24]; also paragraph thirteenth of complaint [pp. 32 and 33, Tr. of Rec.].

It also appears from the affidavit in support of application for the order of arrest that a cause of action existed against said plaintiffs in error, inasmuch as the affidavit embraces all that is in the complaint and in almost the identical language, and in addition thereto sets forth the things required by the statute to be set forth in an application for an order of arrest, and we quote from the affidavit at length so that the court may, upon a mere examination, observe the correctness of the foregoing statement:

(a) Entered into contract [bottom of p. 69, Tr. of Rec.].

(b) Individual plaintiffs in error were officers and controlled the defendant corporation [p. 70, Tr. of Rec.].

(c) Published and circulated printed matter, and offered for sale and proposed to sell to members of the public certain clothes-washers, etc., and patent rights and the right to purchase and to sell, wholesale and retail, said articles, and affiant received and read said printed documents, believed and relied upon them, and so believing and relying executed the contract [p. 71, Tr. of Rec.].

(d) Plaintiffs in error represented that Domestic Utilities Manufacturing Company was actually engaged in the manufacture and sale of said articles, and that said statements and pretenses and representations in all said documents and in said contract were false, and were a sham and deceit, and worked a fraud upon affiant in this, that defendant corporation was not, nor had it ever been, actually or really manufacturing said articles, except in limited quantities [p. 75, Tr. of Rec.]. And instead of being actually and really engaged in the manufacture and sale of said washers, made a pretense so to do as a blind, shield and screen to its real business and objects, which were to sell its said contracts, etc. [p. 76, Tr. of Rec.].

(e) That defendant in error entered upon the business of selling said articles in accordance with the terms of said contract and paid out large sums of money from her own private funds, and paid to said corporation large sums of money for clothes-washers, etc., to be delivered to her and various other persons, but washers were never delivered [pp. 71 and 72, Tr. of Rec.]. And

in all things carried on and performed the contract, but said corporation utterly failed, etc., to carry out its part of said contract or to deliver goods purchased and paid for, or any part of them, though often demanded, but instead delivered defective, damaged and unsaleable articles, which were utterly worthless; she sold 30,000 clothes-washers to the public—corporation never delivered over 4,000 washers—created obligations to deliver articles sold and by failure of the corporation to deliver she was compelled to and did, with the consent of the corporation, establish factories and did manufacture the articles to fill her sales [pp. 73 and 74, Tr. of Rec.].

(f) Fraud and conspiracy alleged and the acts constituting the same [pp. 74 and 75, Tr. of Rec.].

(g) Corporation only manufactured 500,000, but sold ten millions [pp. 75 and 76, Tr. of Rec.].

(h) Defendants encouraged sale of contracts and discouraged sale of articles and hindered and prevented defendant in error from doing business as contemplated by the contract [pp. 76 and 77, Tr. of Rec.].

(i) Purchased articles and paid to corporation $13,003.00. Corporation received said sum, but refused to deliver articles, which never have been delivered [p. 77, Tr. of Rec.]. Though often demanded [p. 78, Tr. of Rec.].

(j) Defendant in error established factories and salesrooms in various cities, and plaintiffs in error cut prices on the articles in cities where her factories were established to prevent sales by defendant in error and drove her out of business [pp. 78 and 79, Tr. of Rec.]. And further hindered defendant in error by circulating

a letter, Exhibit B of the affidavit [pp. 81, 82, 83, 84 and 122, Tr. of Rec.]. All as part of the conspiracy, and to avoid performance by the defendants [pp. 84 and 85, Tr. of Rec.].

(k) Defendant in error acted in good faith [p. 85, Tr. of Rec.]. Sought redress against plaintiffs in error [pp. 85 and 86, Tr. of Rec.].

(l) Has demanded repayment of moneys paid [p. 86, Tr. of Rec.].

(m) Plaintiffs in error guilty of universal and continuous practice of issuing bogus warehouse receipts without the goods behind them and delivered such a receipt to defendant in error, and although goods were demanded they were never delivered [pp. 86 and 87, Tr. of Rec.].

(n) That the corporation and individual defendants have always kept its and their money and property hidden and covered up and out of reach of legal process, etc. That they have property, but the same cannot be reached, and that the property of the individual defendants was all acquired through the methods described [pp. 87 and 88, Tr. of Rec.].

(o) That plaintiffs in error and each of them will abscond, will remove and dispose of property and obliterate all evidence of location [p. 88, Tr. of Rec.].

(p) No adequate remedy at law [pp. 88 and 89, Tr. of Rec.].

(q) Defendant in error was induced to enter into the contract through the fraud, deception, false statements and representations made to her, by plaintiffs in error, made at and before the entering into of said

contract and by the contract itself [pp. 89 and 90, Tr. of Rec.].

(r) Has demanded redress of the wrongs, and plaintiffs in error showed defiance of law and courts and of defendant in error's rights [p. 90, Tr. of Rec.].

(s) Damages complained of resulted from the breach by plaintiffs in error [pp. 90 and 91, Tr. of Rec.].

(t) Statutory allegation of fraud [pp. 91 and 92, Tr. of Rec.].

(u) Plaintiffs in error have removed, disposed of, etc., property of the corporation and of said individual plaintiffs in error and of themselves, the individual plaintiffs in error [p. 91, Tr. of Rec.].

(v) That plaintiffs in error have appropriated to their own use and benefit all money and profit of the corporation, gained through their practices [p. 92, Tr. of Rec.].

(w) That Edwin R. Crooker and Harry L. Crooker are constantly on the move from state to state and to foreign countries in carrying forward their schemes [pp. 92 and 93, Tr. of Rec.].

(x) Edwin R. Crooker has repeatedly declared intention to go to England to remain indefinitely [p. 93, Tr. of Rec.].

(y) That plaintiffs in error were at the time of the filing of the affidavit preparing for immediate departure from the United States [p. 93, Tr. of Rec.].

(z) States source of her information and gives reasons why source of her information makes no affidavit [pp. 94, 95 and 96, Tr. of Rec.].

(aa) Has made repeated efforts to apprehend plaintiffs in error; that plaintiffs in error in each instance slipped away [pp. 96, 97, 98 and 99, Tr. of Rec.].

(bb) Defendant in error has realized no profits or advantages, and as soon as she learned of the fraud ceased to do business and undertook to correct and undo her error in engaging in said business and to reimburse persons who had lost through her agency [pp. 99 and 100, Tr. of Rec.].

(cc) In entering into said contract and purchasing said articles she dealt with plaintiffs in error and their representatives and was deceived [pp. 101 and 102, Tr. of Rec.].

(dd) Plaintiffs in error have at all times had absolute control, management and domination of the corporation and have been the framers, moulders and instigators of all its policies, schemes and plans [pp. 102 and 103, Tr. of Rec.].

(ee) As fast as money or property was acquired, individual plaintiffs in error divided the same among themselves; obscured title by fictitious names [pp. 103 and 104, Tr. of Rec.].

(ff) Defiance of law and obligations [p. 104, Tr. of Rec.].

(gg) And in addition to the foregoing allegations of fact, defendant in error sets forth in her affidavit the contract entered into by her as Exhibit A [p. 105, Tr. of Rec.], and the terms of said contract show the same to be an endless chain scheme and a fraud, and was so held and found to be true by the Honorable W. H. Lamar, an assistant attorney-general of the United States [pp. 97, 85 and 86, Tr. of Rec.].

Yet counsel for plaintiffs in error contend that the affidavit does not show that a cause of action existed.

3. The amendment to the complaint relates back to the filing of the original complaint.

See authorities cited under division first, subdivision (b), this brief.

4. The amendment to the complaint and the motion and affidavits show diversity of citizenship sufficient to confer jurisdiction upon the district court at the commencement of the action.

It will be observed that the amendment was not an amended complaint, but an *amendment to the complaint.*

The motion for leave to amend the complaint [p. 132, Tr. of Rec.] asks leave to amend "By making the first paragraph of her said complaint read as follows:

"First. That she is a single woman, and is a citizen of the state of Alabama, one of the states of the United States of America, instead of

" 'First. That she is a single woman, a resident and citizen of the city of Washington, in the District of Columbia,' as her said complaint now reads at lines sixteen and seventeen of page one of her said complaint, * * *"

And it is stated in the motion (paragraph 1, id.) "That at the time of the making and filing of her said complaint herein, she was and still is a citizen of the state of Alabama, and was not a citizen of the city of Washington or of the District of Columbia;" and said motion goes on to explain how the error occurred, and the same facts are made to appear in the affidavit in support of motion to amend [p. 136, Tr. of Rec.], and

particularly on page 137, Tr. of Rec., and a statement of how the error occurred appears also in the affidavit of Robert L. Hubbard in support of motion for leave to amend complaint [pp. 138, 139 and 140, Tr. of Rec.].

An amendment of this character is sufficient, if it states the citizenship in the present tense, and need not state that the citizenship necessary to confer jurisdiction existed at the time of the commencement of the action.

Please see authorities hereinabove cited under subdivisions (b), (c) and (d) under the *first* division of this brief, and also the authorities cited under the *second* division of this brief.

5. The affidavit filed in support of the application for an order of arrest presents the necessary facts under the statute, section 479, Cal. Code Civ. Proc., *supra,* to warrant the issuance of the order of arrest, and under the terms of section 481, Cal. Code Civ. Proc., shows "that a sufficient cause of action exists, and that the case is one of those mentioned in section 479 of said code," the provisions of which are set forth in this brief at page ..., and the court may look to the record to see if a cause of action is pending, and a federal court may issue the order of arrest upon the complaint alone, and even though no affidavit at all is on file, and is not limited to the affidavit filed.

Ex parte Cohen, 6 Cal. 320. (Last paragraph on page.)

United States v. Walsh, Fed. Cas. No. 16,635, 1 Abb. (U. S.) 66, Deady 281:

"Where the cause of action and arrest are identical, *a verified complaint is a sufficient affidavit upon which to allow an order of arrest.*"

Ord v. Hosmer, circuit judge (Mich.), 125 N. W. 681, at page 682:

"This is mandamus to require the circuit judge to enter an order quashing a writ of *capias*. The writ was accompanied by an affidavit, as follows: * * * he believes the said S. W. Co. is entitled to recover the sum, etc. * * * Ord was agent and factor and after termination of relationship collected outstanding debts and used to his own benefit.

"The criticism made upon this affidavit is that the affidavit states merely a conclusion and does not appear to be made upon the information of affiant. We agree with the circuit judge that the affidavit is not open to this criticism, and there is enough of substance contained in the affidavit to warrant the order holding to bail."

Muir v. Brooks, Circuit Judge (Mich.), 114 N. W. 659:

"Relator was taken into custody and released on bail, and afterwards appeared specially and made a motion to vacate the order holding to bail and quash the writ of capias, for a number of reasons which may be briefly summarized as follows: (1) The affidavit for the writ does not state in terms that the matters therein stated are upon the personal knowledge of the affiant. (2) The falsity of the alleged representations are not stated upon the personal knowledge of the affiant nor does it appear that they are within her personal knowledge, but, on the contrary, are based upon hearsay. (3) The affidavit is vague and indefinite and insufficient to authorize the issuance of the writ. The motion

was denied by the circuit judge and relator seeks by mandamus to vacate the order and compel the granting of the motion.

"The whole question relates to the sufficiency of the affidavit. It sets out in detail the representations that were made. They were all made by defendant to plaintiff personally. After she purchased the business, plaintiff went into possession thereof, and considered it for a month. While the falsity of some of the alleged representations are not stated upon the personal knowledge or within the personal knowledge of the plaintiff, many of them are shown to be within her personal knowledge, and sufficient of them are so made to appear to authorize the issuance of the writ. Paulus v. Grabben, 104 Mich. 42, 62 N. W. 160. The affidavit is a very long one, and it would profit no one to set it out in full. A reading of it satisfies us that the circuit judge was right in holding the affidavit showed on its face that plaintiff had personal knowledge of sufficient of the material facts stated in said affidavit to justify the issuance of the writ."

Fourth. In response to the fourth, eighth, twelfth and sixteenth assignments of error, they being identical, but set forth separately for different plaintiffs in error, defendant in error contends:

1. There is no law requiring that the order of arrest be made only *after* or when a summons has been issued in the action. Section 483, California Code of Civil Procedure, reads:

"The order *may* be made at the time of the issuing of the summons, or any time afterwards before judgment."

These assignments of error conform to the amended notices of motion of the defendants in the District Court for an order vacating the order of arrest, for in each of said notices this language is used [pp. 153, 155, 158 and 160, Tr. of Rec.], respectively, for the different defendants]:

"IV. That said order of arrest is void, for the reason that at the time said order of arrest was made no summons *had* been issued in said action."

This ground, which was urged upon the District Court as a reason for vacating the order of arrest, was, and in this court it is insufficient, not warranted by law, and was not and is not a ground for vacating the order of arrest, and the District Court was at liberty, and this court is at liberty, to disregard said ground or reason in considering the motion for an order vacating the order of arrest and in considering the assignments of error herein.

But in addition to this technical, legal reason which renders the assignments of error of no avail in this court, and which made the motion for an order vacating the order of arrest in the District Court of no avail, although sufficient in our judgment to warrant this court in disregarding the fourth, eighth, twelfth and sixteenth assignments of error, and notwithstanding the fact that said assignments of error are technical in their character and might properly be answered by technical objections to their sufficiency, we present for the consideration of the court the further reasons why said assignments of error cannot avail the plaintiffs in error herein:

The statute as above quoted (section 483, California Code of Civil Procedure) says: "The order *may* be made at the time of the issuing of the summons." It becomes necessary to consider what is meant in the statute by the words: "at the time." Certainly it would be a strange construction, as well as a strained construction, to say, as counsel for plaintiffs in error do, that "at the time" means or is equivalent to the words *after the summons has been issued,* or, that an order of arrest issued by the judge a few minutes or a short time before the summons is issued by the clerk would be void. We do not believe that such would be a reasonable construction of the statute. We believe that a reasonable construction of the statute can lead to but one conclusion as to its meaning and that that conclusion should be that the statute contemplates the issuance of the order of arrest at, or about, the time of the commencement of the action by the filing of the complaint, the issuance of the summons and the making of the order of arrest in the usual and ordinary course of business, and according to the usages and practice of the court and the clerk's office with respect to such matters and that whether the order or the summons be physically made out first is a matter of complete indifference. If the two go forth from the clerk's office to the hands of the United States marshal for service upon the defendants at one and the same time, they are made and issued "at the time of," and we are not without authority to the effect that the making of the order and the issuing of the summons do not alone consist of the signing of the order by the judge and the signing of the summons by the clerk, but that

the act or acts of making and issuing comprise as well the delivery of the order and summons, when properly executed and authenticated, for the purpose of service upon the defendants. This delivery of the order of arrest and summons was simultaneous and they were then, and only then, made and issued respectively.

Howe v. Warren, 154 Ill. 247, 40 N. E. 472:

"It is, however, insisted, that 'at the date of the assignment,' means, 'after' the date of the assignment. This construction is, in our judgment, not admissible. In its customary acceptation, the word 'at' is generally understood to mean 'at the time of,'—not before or after,—and expresses the relation of presence and nearness, in either place or time. 'At the date of the assignment' would necessarily mean *at the time when it was in condition to become, but had not in fact become, effective as an assignment under the statute.* We are of opinion it means the rights and duties as they existed when the assignment was made, and that would necessarily mean prior to or up to the date of the assignment becoming operative.' "

Jenks v. State, 39 Ind. 1;
Rick v. Beeler, 90 Tenn. 548, 39 L. R. A. 636;
Dawson v. Daniel, 2 Flip. (U. S.) 305;
Clark v. Kent, Circuit Judge, 125 Mich. 449;
Hunter v. Wetsell, 38 Am. Rep. 544;
County of Los Angeles v. Hannon, 159 Cal. 43;
People v. Blanding, 63 Cal. at page 33.

Harris v. State, *ex rel* Donlan, 33 L. R. A. 92:

"The context in which words and the subject matter in the discussion of which they are used, are the primary tests, where their meaning is sought. This is a case discussing the preposition 'at.' "

It will be observed, also, that while the California Code of Civil Procedure, section 483, says: "The order *may* be made at the time of issuing the summons or any time afterwards before judgment," section 481 of the same Code of Civil Procedure uses this language:

"The order (of arrest) may be made *whenever it appears to the judge, by the affidavit of the plaintiff, or some other person, that a sufficient cause of action exists and that the case is one of those mentioned in section* 479."

Now, this section (481) has reference to the time when the order may be made just as directly as section 483 does and section 483 uses the word "may" and one will search in vain for any statutory provision forbidding the "making" of the order of arrest before the issuing of the summons.

We are content, however, with our contention that "at the time of," as used in section 483, means, as a part of the acts and things done in commencing the action by the filing of a complaint, the presentation of the affidavit as the basis for the order, the signing of the order by the judge and the issuing of the summons by the clerk and all other things required to be done up to the point of making the order of arrest and the process of the court effective or operative.

And in this connection we are not without authority defining the meaning of "issuing" as applied to summons and other writs, and we believe that the word "made" as used in section 483, Cal. Code Civ. Proc., and as applied to the order of arrest, stands upon the same footing as writs and processes as well defined by authorities.

People, *ex rel* McCallum, v. Gebhard (Mich. 1908), 118 N. W. 16:

"The writ of *capias ad respondendum* was not prematurely issued. The date of a writ is undoubtedly *prima facie* evidence of the time it was actually issued (Howell v. Shepard, 48 Mich. 472, 12 N. W. 661), but a suit is not commenced by writ until the writ is delivered or transmitted to an officer with the *bona fide* intention of having it served (Dedenbach v. City of Detroit, 146 Mich. 710, 110 N. W. 60). That statute (Comp. Laws, Sec. 9998) permit personal actions to be commenced by *capias ad respondendum* in certain cases 'where an order for bail shall be indorsed on the writ by a judge of the court from which the writ issues, * * * directing the amount in which bail is to be taken.' The writ is uniform, both a summons addressed to the defendant to appear and defend the suit, and a command, addressed to the sheriff, to take the defendant into custody and keep him until discharged according to law. It is absolutely non-effective as authority to make an arrest until, upon the affidavit of the plaintiff, or some person in his behalf, showing the nature of the plaintiff's claim (Comp. Laws 9999), the order directing the amount in which bail is to be taken is indorsed 'upon the writ.' It is then, and not until then, a warrant to seize the person of the defendant. It is then *issued,* and upon probable cause supported by oath or affirmation. The statute does not require the filing of the affidavit with the clerk as a condition precedent to the issuing of the writ. Exhibiting it to the clerk can accomplish no useful purpose. It must in any event be considered by another and a judicial officer. Johnson v. Morton, 94 Mich. 4, 53 N. W. 816. The point ruled by Baker v. Dubois, 32 Mich. 92; Taylor v. Buck, 100 Mich. 181, 58 N. W. 835, and not by Buckley v. Lowry, 2 Mich. 418. See, also, Clark v.

Kent, Circuit Judge, 125 Mich. 449, 84 N. W. 629. The judgment of the plaintiff against George Schoettle is not void *because the writ was prematurely issued.*"

Dedenbach v. City of Detroit, 146 Mich. 710, 110 N. W. 60.

" 'The commencement of suit consists of suing out the summons, and delivering or transmitting it to an officer with the *bona fide* intention of having it served.' Such is believed to be the rule generally in this country; see Peck v. Ins. Co., *supra*. In Angel on Limitations, Sec. 312, the rule is stated as follows: 'The general rule appears to be in this country that at the time of suing out the writ the action commences and either when the writ is delivered to the sheriff or to his deputy or when it is sent to either of them, with a *bona fide* intention to be served upon the defendant, *it is considered to have issued.*' "

Peck v. Ins. Co., 102 Mich. 52, 60 N. W. 453;
Howell v. Shepard, 12 N. W. 661;
Hancock v. Ritchie, 11 Ind. 48.

Respectfully submitted,

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